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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

PIMA COUNTY PUBLIC FIDUCIARY, Conservator for CHERIE ADAMS, a protected person, Petitioner/Appellee, v. JACK J. RAPPEPORT and GINGER RODGERS RAPPEPORT, husband and wife, Respondents/Appellants.	2 CA-CV 2007-0138 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. GC20070078

Honorable Clark Munger, Judge

VACATED AND REMANDED

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P E L A N D E R, Chief Judge.

¶1 In this conservatorship action, appellants Jack and Ginger Rappeport each appeal separately from the trial court's order imposing sanctions, including entry of default and default judgment against them and in favor of appellee Pima County Public Fiduciary (PF), conservator for Cherie Adams. Jack contests the factual and legal bases for that order and also contends the court erroneously imposed sanctions when he raised a serious question about his competency and his ability to represent himself. Ginger, Jack's wife, challenges the sanctions imposed against her because the court could not and did not find that she had intentionally violated any court orders. We agree with Ginger and, therefore, vacate the sanctions against her. As for Jack, we find no abuse of discretion in the trial court's determination that his failure to comply with a court order for an accounting warranted sanctions. But, because the record does not clearly reflect that the court fully considered and rejected lesser sanctions than those imposed, and because lingering questions about Jack's competency were before the court and remain unresolved, we vacate the order imposing sanctions and remand the case for further proceedings.

Background

¶2 In February 2007, pursuant to A.R.S. § 14-5401, the PF petitioned to be appointed as temporary conservator for Cherie Adams, a then eighty-nine-year-old woman. The trial court granted that petition. The PF also filed a petition for surcharge, for a temporary restraining order, and for an order to show cause. The petition alleged that Jack, a long-time member of the Arizona bar, had used Adams's powers of attorney to exploit her financially.

¶3 After several proceedings detailed below, and after the trial court ordered Jack to account for all actions he had taken pursuant to the powers of attorney over a ten-year period, the PF moved for sanctions against Jack and Ginger based on Jack's failure to comply with the court's order. Following a hearing in July 2007, the court granted the PF's motion and later entered a formal order striking Jack's and Ginger's "answers," entering default and default judgment against them and in favor of Adams, and forfeiting whatever interest they had in approximately $2.1 million and certain parcels of real property. This appeal followed.

Discussion

I. Jurisdiction

¶4 We preliminarily address our subject matter jurisdiction, particularly in view of the PF's suggestion that only ¶¶ 3–5 of the trial court's sanctions order are appealable. Those paragraphs contained specific judgments against the Rappeports and awarded to the PF, on Adams's behalf, $2,159,150 held in its bank trust account, two parcels of real estate,

and proceeds from the sale of certain other real properties. Pursuant to Rule 54(b), Ariz. R. Civ. P., the court found ¶¶ 3–5 were "final judgments" and there was no just reason for delay in entering those judgments. The PF contends that, because the court's Rule 54(b) language did not expressly apply to ¶¶ 1–2 of the court's order, the portions that struck the Rappeports' answers and entered default against them and in favor of Adams, neither Jack nor Ginger can contest those aspects of the order in this appeal. In response, Ginger maintains that the court's entire order is appealable because "the sanctions and default are based upon the exact same set of facts, the exact same violation of rules, and the exact same Order." We agree with Ginger.

¶5 Rule 54(b) applies when, in an action involving multiple claims, a trial court enters judgment on some but not all of the claims. *See Ulan v. Kay*, 5 Ariz. App. 395, 396, 427 P.2d 376, 377 (1967). Similarly, default judgments are subject to Rule 54(b) when, as here, multiple parties are involved.[1] *See Sullivan & Brugnatelli Adver. Co. v. Century Capital Corp.*, 153 Ariz. 78, 80, 734 P.2d 1034, 1036 (App. 1986). And Rule 54(b) applies to proceedings and judgments in probate court. *See Kinnear v. Finegan*, 138 Ariz. 34, 35, 672 P.2d 986, 987 (App. 1983); *see also* A.R.S. § 14-1304. A default judgment against one defendant is not final and appealable unless the court expressly determines that there is no just reason for delay and directs entry of judgment. Ariz. R. Civ. P. 54(b). Here, the trial court did apply Rule 54(b) to that part of its order awarding monies and real properties to the

[1]Jack's sister and daughter are also parties in the litigation below.

PF, on Adams's behalf. Thus, the judgments rendered in those three paragraphs are final and appealable because they determine the disposition of the property in favor of one party. *See Decker v. City of Tucson*, 4 Ariz. App. 270, 272, 419 P.2d 400, 402 (1966) ("A final judgment or decree decides and disposes of the cause on its merits leaving no question open for judicial determination.").

¶6 The court's failure to expressly apply Rule 54(b) language to ¶¶ 1 and 2 of its order, however, does not divest this court of jurisdiction over that part of the order. The striking of the Rappeports' answers and entry of default against them were necessary prerequisites for, and are inextricably intertwined with, the default judgments entered against them. Because the court's sanctions effectively stemmed from, and were directly related to, the default entered against Jack and Ginger, we find the entire order final and appealable. *See* A.R.S. § 12-2101(D), (J); *cf.* A.R.S. § 12-2102(A) (on appeal from final judgment, appellate court "shall review any intermediate orders involving the merits of the action and necessarily affecting the judgment").

II. Sanctions against Jack Rappeport

¶7 Jack contends "[t]he trial court's order imposing sanctions must be vacated and set aside because it is not based upon any sworn testimony or reliable evidence." He also maintains the PF failed to prove that Cherie Adams was a "'vulnerable adult'" or that he "stole any monies from [her]." Similarly, Jack contends the sanctions imposed "bear no reasonable relationship to the alleged discovery violations" or to the damages awarded in the

judgment and claims the PF inaccurately "estimated" the amount rather than providing "reliable evidence." *See Taliaferro v. Taliaferro*, 188 Ariz. 333, 341, 935 P.2d 911, 919 (App. 1996). The PF responds that the court's sanctions order was justified and proper in all respects. We review a trial court's imposition of sanctions for an abuse of discretion. *See Poleo v. Grandview Equities, Ltd.*, 143 Ariz. 130, 133, 692 P.2d 309, 312 (App. 1984). "It is our function to review the record and determine whether there is a reasonable basis for the trial court's ruling." *Id*.

¶8 A "trial court has broad discretion in imposing . . . sanctions." *Groat v. Equity Am. Ins. Co.*, 180 Ariz. 342, 346, 884 P.2d 228, 232 (App. 1994); *see also Poleo*, 143 Ariz. at 133, 692 P.2d at 312. "This discretion is limited, however, where the ultimate sanctions of dismissal or entry of default judgment are concerned. In particular, dismissal is inappropriate when the failure to comply with a discovery order reflects inability rather than willfulness, bad faith, or fault." *Groat*, 180 Ariz. at 346, 884 P.2d at 232 (citations omitted); *see also Societe Internationale Pour Participations Industrielles Et Commerciales v. Rogers*, 357 U.S. 197, 212 (1958); *Zimmerman v. Shakman*, 204 Ariz. 231, ¶ 13, 62 P.3d 976, 980 (App. 2003) ("Sanctions for abuses of discovery or disclosure 'must be appropriate, and they must be preceded by due process.'"), *quoting Montgomery Ward & Co. v. Superior Court*, 176 Ariz. 619, 622, 863 P.2d 911, 914 (App. 1993).

¶9 We review the procedural background in some detail because it provides necessary context for the sanctions order at issue here. On the PF's filing of this action in

February 2007, the trial court granted a temporary restraining order against both Jack and Ginger, enjoining them "from selling, transferring or removing any property previously or currently belonging to Cherie Adams." On February 8, 2007, the court held a preliminary injunction hearing, the notice for which had been served on both Jack and Ginger in Texas. Before the hearing, Jack called the court and sent a facsimile message requesting a continuance, explaining that he could not attend the hearing because he was awaiting a medical procedure in Texas. Although neither Jack nor Ginger appeared for that hearing, Jack had an attorney appear but merely to observe for him. The court granted the preliminary injunction and set an order to show cause hearing for April 23. The court also ordered Jack, by March 30, 2007, to "account for all actions taken pursuant to any power of attorney from and after June 16, 1997, through and including January 31, 2007." The court sent a copy of its minute entry from the February 8 hearing to Jack. Sometime in February 2007, Jack was served with the PF's petition for surcharge and its corresponding Exhibit "A," which asked him to produce documents and financial records.

¶10 In April 2007, Jack and Ginger, through counsel, filed separate answers to the petition for surcharge. At the order to show cause hearing on April 23, which Jack attended, the Rappeports' counsel moved to withdraw without their consent, and the court granted that motion. The court noted that Jack had not complied with its February 8 order to account by March 30 for his actions under the powers of attorney. Because the prior order had not been "reduced to writing," however, the court then issued a formal, signed order, which extended

the deadline for compliance to May 18, 2007. The court noted, and Jack acknowledged, that he had been aware of the order. And the court clearly warned him, stating: "Mr. Rappeport needs to file his accounting. If that accounting is not filed in the format of the court accounting, then this Court's going to have no choice but to find that all of the money and all of the real estate belongs to Ms. Adams."

¶11 When Jack failed to file any accounting by May 18 as ordered, the PF filed a "motion to compel compliance with order and for sanctions" on May 23. The Rappeports apparently were served with that motion the next day, but the record contains no notice of hearing on that motion. At a proceeding on May 25 apparently relating to the PF's motion to compel, only the PF appeared and the court continued the matter to July 10.

¶12 On June 5, eighteen days after the extended due date, Jack filed a two-page document entitled "Use of Durable Power of Attorney of Cherie Adams Accounting," in which he claimed he had only used her powers of attorney twice.[2] At a "scheduling conference" on June 7, for which neither Jack nor Ginger appeared in person or by telephone despite having received notice in April,[3] the trial court found that Jack's June 5 filing was not a sufficient accounting and did not comply with the court's order. The court then

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[2]Jack's assertion that he had used only twice the powers of attorney Adams had given him was basically consistent with his statement to the trial court at the April 23 hearing that he had no records that he knew of, but at most had used the powers of attorney "two or three times."

[3]Although Jack had told the trial court on April 23 he might be in surgery on June 7, he never confirmed that or otherwise explained his absence from the June 7 conference either before or after it occurred.

instructed the PF "to file appropriate pleadings regarding Mr. Rappeport's failure to comply with this Court's Order to Show Cause and notice said pleadings to be heard on July 10, 2007." The court also noted:

> [I]t is appropriate for the [PF] to expand the Motion to Compel to request sanctions, which sanctions may include removal of the Rappeports' names, and other names as necessary, from all real estate and accounts, and the turning over of all real estate and accounts to the conservator for Cherie Adams.

¶13 Citing Rules 16(f), 26(f), and 37, Ariz. R. Civ. P., the PF then moved for sanctions on June 28 against both Jack and Ginger "for the deliberate disregard of [the Superior] Court's direct Orders to Defendant Jack Rappeport to provide information and an accounting of the affairs of [Cherie Adams]." The PF requested "severe sanctions," asking the court to strike Jack's answer and to enter a default and judgment against him.

¶14 At the July 10 hearing on the motion for sanctions, Ginger appeared without counsel. New counsel appeared on Jack's behalf for the limited purpose of arguing that the hearing be continued. The recently retained attorney expressed concerns about Jack's competency and asked for more time to prepare, but the trial court denied any continuance and declined to investigate the allegations of Jack's incompetency at that time. The PF then presented various exhibits and argued its position regarding Jack's allegedly improper or unexplained dealings with Adams's assets. The PF also read excerpts from Jack's deposition, in which he refused or was unable to explain various transactions allegedly involving Adams's property, stating that if he "thought about it[, he] might come up with the

right answer." Based on Jack's unresponsive answers to questions and his failure to bring any documents with him to the deposition as he had been directed to do, the PF argued that Jack's failure to think about the accounting, despite having been under court order to do so since February, demonstrated a willful failure to comply. The court apparently agreed and granted the motion for sanctions.

¶15 Based on this record, we cannot find the trial court abused its discretion in determining that Jack should be sanctioned in some manner. Rule 37(b)(2)(C), on which the PF's motion was partially based, provides: "If a party . . . fails to obey an order to provide or permit discovery . . . the court in which the action is pending may make such orders in regard to the failure as are just, and [may issue] . . . [a]n order striking out pleadings or parts thereof . . . or rendering a judgment by default against the disobedient party." The record reflects that Jack repeatedly failed properly to disclose his financial dealings with Adams and violated the court's order requiring him to account fully for his actions over a ten-year period under the powers of attorney she had granted him.

¶16 Jack further argues, however, that the sanctions order should be vacated "because the court failed to consider whether any alleged non-compliance on [his] part was due to his incompetence and incapacity" or instead was willful. *See Groat*, 180 Ariz. at 346, 884 P.2d at 232. We separately address below the issue of Jack's alleged incompetency, but we reject his argument that the trial court failed to even consider whether his conduct was willful. In its order imposing sanctions, the court expressly found that Jack,

> for himself and the community of Jack J. and Ginger Rodgers Rappeport, despite several continuances of this Court's initial order to provide an accounting to the Court, has willfully and repeatedly violated the Orders of the Court by not providing a sufficient accounting of his activities in connection with the affairs of the protected person, Cherie Adams.

The court also found that Jack had "willfully and repeatedly violated discovery orders of the Court, failed to comply with discovery obligations, and impeded the ability of the protected person to investigate his activities as a fiduciary."

¶17 We cannot say the record lacks any "reasonable basis for the trial court's ruling" and for the findings on which it was based. *Poleo*, 143 Ariz. at 133, 692 P.2d at 312. Considering Jack's untimely and insufficient accounting, his acknowledged awareness and disregard of court orders, and the PF's unchallenged assertions made at the hearing, the trial court did not abuse its discretion in determining that sanctions against Jack were warranted. *See Austin v. City of Scottsdale*, 140 Ariz. 579, 581, 684 P.2d 151, 153 (1984).

¶18 Jack also asserts the trial court erred in failing to consider "less drastic sanctions" than those the court ultimately imposed. On this point we must agree. "The sanctions of dismissal and entry of default judgment being so harsh, courts have expressed a preference for less drastic sanctions." *Zakroff v. May*, 8 Ariz. App. 101, 103, 443 P.2d 916, 918 (1968). As noted above, "[t]he trial court's discretion in entering a default for failure to comply with discovery orders 'is more limited than when it employs lesser sanctions.'" *Montgomery Ward & Co.*, 176 Ariz. at 621, 863 P.2d at 913, *quoting Lenze v. Synthes, Ltd.*, 160 Ariz. 302, 305, 772 P.2d 1155, 1158 (App. 1989); *see also Wayne Cook Enters. v. Fain*

Props. Ltd. P'ship, 196 Ariz. 146, ¶ 5, 993 P.2d 1110, 1111 (App. 1999). "The sanction of dismissal is warranted only when the court makes an express finding that a party . . . has obstructed discovery . . . and that the court has considered and rejected lesser sanctions as a penalty. Ordinarily, this requires an evidentiary hearing." *Wayne Cook Enters.*, 196 Ariz. 146, ¶ 12, 993 P.2d at 1113 (citations omitted).

¶19 In vacating a dismissal ordered as a sanction in *Nesmith v. Superior Court*, 164 Ariz. 70, 790 P.2d 768 (App. 1990), the court stated:

> [W]e can not tell from this record whether the [trial] judge thoroughly considered other, less severe, sanctions before resorting to the most extreme. In fact, it appears as if he did not. Dismissal as a sanction is to be exercised with great caution. There are constitutional limitations on the power of the courts to dismiss an action, even in aid of their own valid processes. Our supreme court in *AG Rancho Equipment*[*v. Massey-Ferguson, Inc.*, 123 Ariz. 122, 124, 598 P.2d 100, 102 (1979),] quoted with approval from *Edgar v. Slaughter*, 548 F.2d 770, 772 (8th Cir. 1977):
>
> > Prior to dismissal or entering a default judgment, fundamental fairness should require a district court to enter an order to show cause and hold a hearing, if deemed necessary, to determine whether assessment of costs and attorney fees or even an attorney's citation for contempt would be a more just and effective sanction.

Nesmith, 164 Ariz. at 72, 790 P.2d at 770 (citations omitted).

¶20 The same observations can be made in this case and, in our view, apply not only to dismissal of a plaintiff's claims but also to the entry of default and default judgment against a defendant as a sanction for discovery violations. The trial court here held no

evidentiary hearing, nor did it expressly "consider[] and reject[] lesser sanctions as a penalty" before imposing the most extreme sanctions possible against Jack. *Wayne Cook Enters.*, 196 Ariz. 146, ¶ 12, 993 P.2d at 1113. As the court in *Montgomery Ward & Co.* aptly observed:

> The heavier the sanction contemplated, the more deliberate the process that is due and the more thorough the findings that should be made. The process can take time, and the facts can be hard to find. But the supreme court has directed that trial courts take the time, manage the process, resolve the disputes, and sanction all lawyers and parties found to have violated the rules.

176 Ariz. at 622, 863 P.2d at 914.[4]

¶21 Jack further contends, and the PF concedes, that "the sanctions imposed should bear some relationship to the discovery violations which have occurred." *See Taliaferro*, 188 Ariz. at 341, 935 P.2d at 919. Neither the PF's argument on July 10 nor the exhibits introduced at that sanctions hearing establish with any degree of specificity what assets Adams had, or what their value might have been, before she gave Jack powers of attorney. And the record does not establish the nature or amount of loss Adams allegedly sustained as a result of Jack's improper actions or, more importantly, whether any such loss was causally related to Jack's noncompliance with the trial court's discovery order. In other words, the

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[4]We recognize that other Arizona cases involving review of sanctions orders are necessarily fact-intensive and can be factually distinguished from this case. For example, unlike some of the other cases, the trial court did make findings in its sanctions order, and there is no issue here about whether the discovery violation was attributable to counsel rather than the party himself. *See, e.g.*, *Montgomery Ward & Co.*, 176 Ariz. at 622, 863 P.2d at 914; *Nesmith*, 164 Ariz. at 72, 790 P.2d at 770. Nonetheless, the general principles established in those cases apply, and the record here does not reflect the trial court ever addressed the question "whether lesser sanctions would have been appropriate." *Montgomery Ward & Co.*, 176 Ariz. at 622, 863 P.2d at 914.

record does not clearly establish any nexus between Jack's failure to comply with the court's order and the severity of the sanctions ultimately imposed.[5]

¶22 Without minimizing or excusing Jack's noncompliant behavior, we also note that the record reflects several procedural irregularities that, in view of the drastic sanctions imposed, raise some concern. For example, even though the June 7 proceeding had been noticed and designated merely as a "status/scheduling conference," both the PF and trial court seemingly exceeded the stated scope of that proceeding by discussing sanctions against Jack.[6] At the June 7 conference, the PF referred to Jack's "complete and continuing lack of cooperation" and explained that it was "running out of money" to prosecute its petition for surcharge against Jack. The PF and the court then discussed the funds already seized and held in the PF's trust account, and the court said, "So we have $2.17 million to proceed with." The court suggested the PF submit a proposed order authorizing it to use those funds

[5]The nature and extent of appropriate sanctions also should hinge, to some extent, on a showing of prejudice caused by the sanctioned party's failure to disclose. *See Wayne Cook Enters.*, 196 Ariz. 146, ¶ 13, 993 P.2d at 1113. According to the PF, the trial court "made a specific finding that [Jack's] conduct impeded the ability of the protected person [Adams] to account for her assets." But the trial court made no such finding. Rather, the court found that Jack's noncompliance "impeded the ability of the protected person [Adams] to investigate his activities as a fiduciary in connection with funds and properties which presumptively have belonged to [Adams]."

[6]Although the PF previously had filed a "motion to compel compliance with order and for sanctions" on May 23, the record does not show that motion was ever set for hearing on June 7 or any other date. And the motion neither cited any legal authority nor specified the nature, amount, or factual basis for the sanctions sought.

and also noted it was "appropriate" for the PF to request sanctions, including "the turning over of all real estate and accounts" to the PF as conservator for Adams.

¶23 At that same conference on June 7, the trial court set a hearing for July 10 regarding Jack's failure to comply with the court's discovery order. On June 28, the PF filed its expanded motion for sanctions, to which it attached an affidavit from an attorney in the PF's office pertaining to Adams's assets and various related transactions in which Jack allegedly had been involved. Because the PF's motion and notice of hearing were mailed to Jack and Ginger on June 28, they had until July 18 to file a response. *See* Ariz. R. Civ. P. 6(a) (excluding from computation of time periods less than eleven days any "intermediate Saturdays, Sundays and legal holidays"); 6(e) (adding five calendar days to prescribed period when filed document is served by mail); 7.1(a) (opposing parties have ten days to respond to motion). Therefore, the time for Jack or Ginger to respond to the PF's motion for sanctions had not yet elapsed when the trial court heard and granted the motion on July 10.

¶24 In addition, Jack asserts on appeal that, to the extent he failed "to provide any requested documents or account statements, he was unable to do so because the Power[s] of Attorney had been revoked, he was unable to access the requested information and/or documents, and because . . . many of his own records were destroyed during the Mount Lemmon fire." Admittedly, Jack did not clearly articulate those reasons or excuses at or before the July 10 hearing. But it was undisputed in early February 2007 that Adams had revoked all powers of attorney she previously had granted to Jack. And Jack testified in his

June 8 deposition, the transcript of which was admitted as an exhibit at the July 10 hearing, that all of his client files "were destroyed" in the 2003 Mount Lemmon fire and he therefore had no "power to produce" the documents he had been requested to disclose.[7] The trial court did not probe any of those explanations before finding that Jack had willfully failed to comply with the court's order and imposing the harshest sanctions possible against him.

¶25 In sum, the trial court did not abuse its discretion in finding sanctionable Jack's failure to provide a satisfactory and timely accounting, in violation of the court's prior order. Assuming Jack was physically and mentally able to comply with that order, the court could clearly find his recalcitrance warranted some form of sanction. In view of the foregoing concerns about process and the court's failure to have expressly considered and rejected lesser sanctions first, however, we vacate the sanctions order.

III. Jack Rappeport's competency

¶26 Jack also contends the trial court erred by imposing sanctions against him and refusing to continue the July 2007 hearing when "a serious question had been raised concerning [his] capacity to represent himself or others" and his ability to participate in the litigation. The PF responds that the court "properly exercised its discretion to conduct a hearing and grant sanctions in this case without further inquiry into claims that . . . Jack Rappeport lacked the capacity to participate in this litigation." Although we vacate the trial

[7]In her motion for reconsideration filed after the July 10 sanctions hearing, Ginger averred that all of Jack's "legal and financial records . . . were completely destroyed in the Aspen fire the summer of 2003." Ginger also presented the affidavit of a family friend, who averred to the same effect.

court's sanctions order on other grounds, we address the issues relating to Jack's competency because they are likely to arise again on remand and because they were left unresolved below. As noted earlier, we review a trial court's order imposing sanctions for an abuse of discretion. *See Poleo*, 143 Ariz. at 133, 692 P.2d at 312. To the extent Jack implicitly argues the court erred in denying his motion for a continuance, we similarly review that ruling for an abuse of discretion. *See In re Estate of Kerr*, 137 Ariz. 25, 29, 667 P.2d 1351, 1355 (App. 1983).

¶27 Jack first expressly raised the issue of his competency, through new counsel, at the hearing on the PF's motion for sanctions in July 2007.[8] As noted earlier, that attorney, with whom Jack had first met only three days before, made a limited appearance at that hearing. He moved to continue the hearing for thirty days because he needed more time to prepare and because, according to counsel, "Mr. Rappeport ha[d] significant physical and mental incapacities which explain and mitigate some of the problems that ha[d] been encountered." At the hearing, Jack's counsel presented a one-paragraph letter from a doctor stating that Jack was "being treated for multiple medical problems" and "had memory loss,"

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[8]Jack claims the issue of his competency arose earlier, when his previous counsel withdrew in April and requested a continuance to allow Jack to find new counsel due to his "age and infirmity." That motion for a continuance, however, did not question Jack's competency, nor did the attorney move for a guardian or conservator to be appointed for him. *See* A.R.S. § 14-5401. Jack also argues his unsolicited, ex parte communications (via facsimile and telephone messages) with the trial court in February 2007 "were 'red flags' concerning whether [he] was capable of representing himself or others and/or participating in this complex litigation." But, again, no issue of competency was directly raised or conveyed by those actions.

"neurological deterioration," and "subsequent emotional and possibly mental impairment."[9] Jack's attorney also argued:

> I believe that there is a serious question about Mr. Rappeport's competency in this case, and I believe that there may be Rule 25(c)[, Ariz. R. Civ. P.,] issues that need to be developed. And I don't believe that this man is—I know this man is not competent to participate in this hearing this morning. And I don't believe he's competent, and I think it can be developed that he is not competent to represent himself in the rest of this case.

The trial court refused to continue the hearing, noting that Jack had not moved for appointment of a guardian or conservator and that the "letter from [the] doctor [was] brief and vague at best."

¶28 Previously, Jack's first hired counsel had withdrawn in April 2007. On May 25, the court scheduled the July 10 hearing on the PF's motion to compel and for sanctions filed on May 23 and sent a copy of the minute entry to Jack. Despite having had over a month's notice of the hearing and over two months to find new counsel, Jack waited until three days before the hearing to speak with an attorney about representing him. As the trial court stated, Jack had known about the case for "a great long period of time, ha[d]n't done much, [and] now [was] coming in at the critical moment" requesting a continuance and time to retain counsel. And, as the court also noted, if Jack or his counsel were concerned about his competence, he could have petitioned for appointment of a guardian or conservator

[9]The PF's repeated assertion, both below and on appeal, that the doctor did not sign the letter is unsupported and, as far as we can tell, blatantly incorrect.

pursuant to A.R.S. § 14-5401, instead of merely seeking a last-minute continuance. Jack did not do so.[10]

¶29 In addition, Jack failed to comply with Rule 25(c), Ariz. R. Civ. P., which allows a party's representative to be substituted in for an incompetent party but requires the motion be served on other parties. *See* Rule 25(a)(1) and (c). Although Jack's new counsel suggested at the July 10 hearing there might be "Rule 25(c) issues that need to be developed," Jack did not file or serve the other parties with any motion for substitution. Similarly, Ginger asked the trial court during the July 10 hearing to appoint "a guardian and conservator" for Jack, but the court summarily denied that request, noting Ginger could not "speak for him" and merely represented herself. Jack cites no authority to establish that Ginger had standing or any other legal basis to request such an appointment for him. And, as the trial court noted, the physician's letter presented at the July 10 hearing was "vague at best" and did not state that Jack was incompetent.

¶30 Citing *Smith v. Rabb*, 95 Ariz. 49, 386 P.2d 649 (1963), however, Jack maintains the trial court was obligated to probe the competency issue further before proceeding with the sanctions hearing. The court in that case stated that, "if it appears from any of the proceedings that there is a serious question as to a party's competence, the duty devolves upon the trial court to direct a further inquiry into the matter." *Id*. at 56, 386 P.2d

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[10]Of course, if Jack in fact was incompetent during the April to July time frame, that possibly could explain his failures to seek appointment of a guardian or conservator for himself or to comply properly with discovery requests and court orders.

at 654. But the court in *Smith* then concluded that neither the pleadings nor evidence sufficiently raised the competency issue. *Id*. at 57, 386 P.2d at 654. And the court stated, "In the absence of allegations or facts which indicate that a hearing might be in order, the trial judge is entitled to gauge a party's competence by his personal conduct in court." *Id*. Similarly, none of Jack's court filings mentioned his alleged incompetence. And, as in *Smith*, the trial court here was in the best position to evaluate Jack's competence from his "personal conduct" before the court and his behavior at the April and July hearings. *Id*.

¶31 Jack also cites two decisions of the Ninth Circuit Court of Appeals, asserting that a court should not enter a judgment on the merits when an incompetent person is unrepresented. *See Allen v. Calderon*, 408 F.3d 1150, 1153 (9th Cir. 2005) ("A party proceeding pro se in a civil lawsuit is entitled to a competency determination when substantial evidence of incompetence is presented."); *Krain v. Smallwood*, 880 F.2d 1119, 1121 (9th Cir. 1989) (holding that "when a substantial question exists regarding the competence of an unrepresented party the court may not dismiss with prejudice for failure to comply with an order of the court"); *but see Ferrelli v. River Manor Health Care Ctr.*, 323 F.3d 196, 201 (2d Cir. 2003) ("Neither the language of Rule 17(c)[, Fed. R. Civ. P.,] nor the precedent of this court or other circuits imposes upon district judges an obligation to inquire *sua sponte* into a pro se plaintiff's mental competence, even when the judge observes behavior that may suggest mental incapacity."). But neither *Allen* nor *Krain* indicates that the trial court abused its discretion here in failing to further investigate the issue of Jack's

competency before proceeding with the sanctions hearing and ultimately imposing sanctions against him.

¶32 Both *Allen* and *Krain* turned on Rule 17(c), Fed. R. Civ. P., which requires a court to "appoint a guardian ad litem for an . . . incompetent person not otherwise represented in an action or [to] make such other order as it deems proper for the protection of the . . . incompetent person." *See Allen*, 408 F.3d at 1153; *Krain*, 880 F.2d at 1121. Arizona's counterpart to that rule, Rule 17(g), Ariz. R. Civ. P., imposes the same requirement. *See Montaño v. Browning*, 202 Ariz. 544, ¶ 9, 48 P.3d 494, 497-98 (App. 2002). Here, however, Jack did not cite Rule 17(g) below until after the sanctions hearing, when he later moved for reconsideration. Nor does he assert on appeal that the trial court erred in failing sua sponte to invoke the provisions of that rule. *See Van Loan v. Van Loan*, 116 Ariz. 272, 274, 569 P.2d 214, 216 (1977) ("The failure to raise an issue either at the trial level or in briefs on appeal constitutes a waiver of the issue."). Moreover, a trial court's obligation under Rule 17(g) presupposes that the unrepresented party is incompetent, a fact not yet established here, much less established as of the July 10 hearing. *See Ferrelli*, 323 F.3d at 201.

¶33 In addition, the trial court was able personally to observe and evaluate Jack's behavior and mental activity at two separate hearings, to review his pleadings and other filings, and to read his deposition testimony given a month before the sanctions hearing. Absent any supporting facts in Jack's court filings or a petition for the appointment of a guardian or conservator for him, the court was in the best position to determine whether there

was any "serious question" about his competency, *Smith*, 95 Ariz. at 57, 386 P.2d at 654, and did not err by denying Jack's oral request for a continuance on those grounds and proceeding with the sanctions hearing. *See Estate of Kerr*, 137 Ariz. at 29, 667 P.2d at 1355.

¶34 The competency issue, however, becomes more complicated when we consider what occurred after the July 10 hearing on sanctions. At the conclusion of that hearing, the trial court granted the PF's motion for sanctions without specifically finding any facts or articulating the basis for its ruling. Thereafter, on August 1, Jack filed a motion for reconsideration, presumably pursuant to Rule 7.1(e), Ariz. R. Civ. P., and a motion for determination of competency, pursuant to Rule 17(g). Much of the documentary and other factual support for Jack's assertions of incompetency was first set forth in those motions.

¶35 In a minute entry dated August 22, the trial court stated it was taking the motion for reconsideration under advisement. But in a separate minute entry issued that same day, the court again acknowledged Jack's motion for reconsideration but stated it had signed the form of sanctions order lodged by the PF, to which both Jack and Ginger had objected. The court's final order imposing sanctions was dated August 21 but filed on August 24. Jack then timely appealed from that order on September 24.

¶36 Somewhat confusingly, both before and after Jack filed his notice of appeal from the August 24 order, the trial court continued to explore his allegations of incompetency and repeatedly referred to Jack's motion for reconsideration as "pending." For example, at a post-judgment status conference on September 6, the trial court noted that its "under

advisement ruling" regarding Jack's motion for reconsideration was still "pending," that the court had heard some argument on Jack's motion for determination of competency, and that it would defer ruling on the motion for reconsideration until "the completion of the competency examinations." At the conclusion of that conference, the court ordered that "[t]he competency examination of the defendant Jack J. Rappeport shall be scheduled at the convenience of the parties requesting same." Jack's counsel indicated Jack was "available for examination," and the court stated it would "determine subsequent legal procedures which will apply in this matter" after its "receipt and review of the mental competency reports."

¶37 The trial court held another status/scheduling conference on October 3, at which time it again referred to Jack's two motions as "pending." The court set a future status conference for December 6, but the record does not reflect whether that conference was ever held or, if so, what might have transpired at it. Nor does the record reflect that the trial court ever expressly ruled on Jack's motions for reconsideration or for determination of competency. Rather, the record reflects that the court deemed those motions still "pending" well after entering the sanctions order in August and after Jack had appealed from that order, and that a procedural mechanism had been initiated, at least preliminarily, for purposes of evaluating Jack's competency.[11]

[11]Generally, when a trial court enters a final judgment without expressly ruling on a pending motion, the motion is deemed denied by operation of law. *See, e.g.*, *Atchison, Topeka & Santa Fe Ry. Co. v. Parr*, 96 Ariz. 13, 15, 391 P.2d 575, 577 (1964); *Overson v. Cowley*, 136 Ariz. 60, 70, 664 P.2d 210, 220 (App. 1982). Based on the court's proceedings

¶38 In challenging the trial court's order imposing sanctions, Jack points not only to "the evidence and circumstances as they existed as of July 10, 2007, and before, but also [to] the motions filed after [that] hearing and before the Order was signed, including the information contained in and attached to these various motions."[12] As noted earlier, based on the evidence before the trial court and the information available to it on or before July 10, we cannot say the court abused its discretion in denying Jack's request for a continuance of the sanctions hearing or in refusing to immediately delve further into the allegations of his incompetency. *See Brookover v. Roberts Enters., Inc.*, 215 Ariz. 52, ¶ 8, 156 P.3d 1157, 1160 (App. 2007) (appellate court reviews summary judgment ruling "on the record made in the trial court, considering only the evidence presented to the trial court when it addressed the motion"); *Cella Barr Assocs., Inc. v. Cohen*, 177 Ariz. 480, 487 n.1, 868 P.2d 1063, 1070 n.1 (App. 1994) (on appeal from dismissal order, court would not reverse trial court based on deposition transcripts attached to motion for reconsideration from trial court's ruling).

¶39 As Jack correctly points out, however, before entering its formal order imposing sanctions in which it made express findings in support of that ruling, the trial court had before it all of the information and materials in Jack's motions for reconsideration and

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and statements made after the sanctions order was entered, however, we do not find that general rule applicable here.

[12]Although the PF responded below to Jack's motion for reconsideration, the PF does not address on appeal either that motion or Jack's related motion for determination of competency, the supporting documents attached thereto, or any bearing those materials might have on the issue of Jack's competency.

for determination of competency. And, as noted above, the court continued to consider and hold those matters open even after entering its sanctions order and even after Jack had appealed from it. "Generally we do not consider arguments on appeal that were raised for the first time at the trial court in a motion for reconsideration." *Evans Withycombe, Inc. v. W. Innovations, Inc.*, 215 Ariz. 237, ¶ 15, 159 P.3d 547, 550 (App. 2006); *see also Cella Barr Assocs.*, 177 Ariz. at 487 n.1, 868 P.2d at 1070 n.1 (appellate court generally will not reverse trial court based on evidence first presented in motion for reconsideration). But that is not a hard-and-fast rule, and in our discretion we may consider matters raised for the first time in motions for reconsideration, particularly when "the facts or arguments presented were not available at the time" the initial ruling was made. *Evans Withycombe*, 215 Ariz. 237, n.5, 159 P.3d at 551, n.5; *see also Crown Life Ins. Co. v. Howard*, 170 Ariz. 130, 132, 822 P.2d 483, 485 (App. 1991) (declining to find argument waived when trial court considered merits of argument first raised in motion for reconsideration). In view of the rather unusual circumstances presented here, and because the record suggests the trial court ultimately, albeit implicitly, detected but did not resolve a substantial question regarding Jack's competency, that issue can and should be revisited on remand.[13]

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[13]"An incompetent cannot bring or defend a legal proceeding in person." *Kiley v. Jennings, Strouss & Salmon*, 187 Ariz. 136, 140, 927 P.2d 796, 800 (App. 1996). But the record does not reflect that Jack ever established, or that the trial court ever identified, the appropriate standard for determining a party's competency in the context of a civil case such as this. In criminal cases, a defendant is competent to waive counsel and represent himself if he has the "ability to understand the nature and consequences of the waiver, or to participate intelligently in the proceedings and to make a reasoned choice among the alternatives presented." *Harding v. Lewis*, 834 F.2d 853, 856 (9th Cir. 1987); *see also State*

IV. Sanctions against Ginger

¶40 Ginger contends the trial court erred in imposing sanctions against her because there was "no basis in law or fact to support the imposition of any sanctions" and "[t]he trial court failed to determine whether there was any intentional or bad faith action on [her] part." We agree and vacate the sanctions against her on that basis as well as for the previously stated reasons for vacating the sanctions order against Jack.

¶41 We first address the PF's assertion that we should deny Ginger's appeal entirely because she failed to raise her arguments below. *See Hahn v. Pima County*, 200 Ariz. 167, ¶ 13, 24 P.3d 614, 619 (App. 2001) (party waives argument not raised in trial court). We find that assertion without merit.

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v. Cornell, 179 Ariz. 314, 322-23, 878 P.2d 1352, 1360-61 (1994); *cf.* A.R.S. § 13-4501(2) (defining incompetency to stand trial). Similarly, in dependency proceedings in juvenile court, a parent is deemed mentally incompetent if he or she "is unable to understand the nature and object of the proceedings or assist in his or her defense." *Kelly R. v. Ariz. Dep't of Econ. Sec.*, 213 Ariz. 17, ¶ 28, 137 P.3d 973, 978 (App. 2006). Courts have applied similar standards to parties in other civil cases. *See, e.g.*, *United States v. 30.64 Acres of Land*, 795 F.2d 796, 805-06 (9th Cir. 1986) (when substantial question raised as to defendant's competency, court applied criminal standard); *Bodnar v. Bodnar*, 441 F.2d 1103, 1104 (5th Cir. 1971) (need for guardian ad litem depended on "whether [plaintiff] was mentally competent to understand the nature and effect of the litigation she had instituted"); *Cyntje v. Gov't of the Virgin Islands*, 95 F.R.D. 430, 431 (D. V.I. 1982) (same); *Sanders ex rel. Rayl v. Kan. Dep't of Soc. & Rehab. Servs.*, 317 F. Supp. 2d 1233, 1239 (D. Kan. 2004) (an "'incompetent person' in [federal] Rule 17(c) refers to 'a person without capacity to litigate.'"), *quoting Thomas v. Humfield*, 916 F.2d 1032, 1035 (5th Cir. 1990). Because the parties have neither briefed nor argued this issue and because the trial court did not resolve it, we do not decide what standard applies to the issue of Jack's alleged incompetency and express no opinion on how that issue should be resolved or on whether Jack was incompetent during the relevant time frame.

¶42 Ginger told the trial court at the July 10 hearing that "[she] ha[d] not been provided with even one document from anybody" indicating that she had anything to do with the case and, "therefore, believe[d her] name should be removed from this case." Additionally, after that hearing, Ginger argued in her motion for reconsideration that there were "no factual allegations against [her]" and that the trial court should have determined whether any alleged failure by her to comply with court orders was willful.[14] In any event, although the PF was not required to prove Ginger's state of mind, it did bear the burden to make at least a prima facie showing of willful action by Ginger to support an order of sanctions against her. *See Am. Title & Trust Co. v. Hughes*, 4 Ariz. App. 341, 343-44, 420 P.2d 584, 586-87 (1966). Because the PF failed to make that showing and because Ginger adequately raised her issues below and provided the court an opportunity to address them on the merits,[15] *see Crown Life Ins. Co. v. Howard*, 170 Ariz. at 132, 822 P.2d at 485, we address whether the court erroneously imposed sanctions against Ginger.

¶43 Again, a trial court's broad discretion to impose sanctions is limited "where the ultimate sanctions of dismissal or entry of default judgment are concerned." *Groat*, 180 Ariz. at 346, 84 P.2d at 232. "At the very least, the trial court should determine whether the failure

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[14]As with Jack's motion for reconsideration, the trial court took Ginger's motion for reconsideration under advisement but never ruled on it and still considered it "pending" as of October 3, 2007.

[15]Even if the issue were arguably waived, the waiver rule is procedural rather than jurisdictional and does not require us to disregard her arguments on appeal. *See Evenstad v. State*, 178 Ariz. 578, 582, 875 P.2d 811, 815 (App. 1993).

to answer [discovery requests] was willful, and whether the circumstances are so aggravated as to justify the drastic action." *Zakroff*, 8 Ariz. App. at 104, 443 P.2d at 919 (citations omitted); *see also Rogers*, 357 U.S. at 212. Here, the court erred by imposing sanctions against Ginger without first finding that she willfully had violated any discovery order pertaining to her. And even had such a finding been made and been supported by the record, the trial court did not preliminarily consider and reject lesser sanctions with respect to Ginger.

¶44 In its sanctions order, the trial court stated that "Jack J. Rappeport, for himself and the community of Jack J. and Ginger Rodgers Rappeport, . . . willfully and repeatedly violated the Orders of the Court by not providing a sufficient accounting of his activities in connection with the affairs of the protected person, Cherie Adams." But the court did not find that Ginger had willfully violated any court order. Additionally, the prior order that required an accounting did not name Ginger and pertained only to Jack. The formal order merely required "Jack J. Rappeport to account to the court for transactions conducted pursuant to powers of attorney[] executed by the protected person." The court neither ordered Ginger to account for her actions nor found that she personally failed to do so. Therefore, the court had no legal basis for sanctioning her.

¶45 In response, the PF maintains that Ginger "has established no claim which would entitle her to appeal from the order of the trial court" because, in a filing entitled "objection to the findings of fact in order dated April 26, 2007," Jack, supposedly on her

behalf, stated she "ha[d] no interest in the funds attributed to her." We find that argument misplaced. Regardless of whether Ginger claimed any separate interest in the property, the court ordered any community property interest she might have had to be "forfeited" without finding that she had willfully violated a discovery order.[16] *See Zakroff*, 8 Ariz. App. at 104, 443 P.2d at 919. When she filed a motion on her own behalf, she expressed concern that the PF was seeking "seizure of her personal assets and property interests." Even assuming the PF is correct that Ginger had no interest in the property, that has no bearing on whether sanctions were properly imposed against her.

¶46 In urging us to uphold the sanctions imposed against Ginger, the PF focuses on Jack's conduct, claiming that "[t]here was sufficient evidence presented to the trial court to support its findings that Jack J. Rappeport, 'for himself and his community,' acted continuously and willfully." The PF's argument merely emphasizes the point that Ginger personally committed no misconduct. In fact, in its motion for sanctions, the PF outlined Jack's willful failure to comply with discovery orders but did not mention any wrongdoing

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[16]Relying on *Spudnuts, Inc. v. Lane*, 139 Ariz. 35, 676 P.2d 669 (App. 1984), Ginger also contends the trial court's entry of default and default judgment against Jack "did not bind [her] community interest" in the property forfeited under the court's sanctions order. In response, citing *Reese v. Cradit*, 12 Ariz. App. 233, 469 P.2d 467 (1970), the PF argues the trial court properly forfeited, as a sanction for Jack's willful noncompliance with the court's discovery order, both his and Ginger's alleged community property interests in all of the money and real estate the PF claimed on Adams's behalf. Because we vacate the court's sanctions order against both Jack and Ginger, we need not address this issue. We do note, however, that the court's broad sanctions order applied to Ginger personally, forfeiting any separate property interest she might have had, not merely her community interest, in the subject property.

by Ginger. As discussed above, the court's order for an accounting did not name Ginger, and the court made no finding that she willfully failed to comply with any order. Therefore, the court abused its discretion in sanctioning her by striking her answer and entering default and default judgment against her without finding that she had willfully violated a court order.[17] *See Rogers*, 357 U.S. at 212; *Zakroff*, 8 Ariz. App. at 104, 443 P.2d at 919.

¶47 Ginger requests that, if we set aside the sanctions order against her, as we do, we grant her attorney fees pursuant to Rule 11(a), Ariz. R. Civ. P., because "there was no objective basis for the Motion for Sanctions against [her]." That rule allows a trial court to sanction a party for a frivolous filing by, inter alia, granting the other party's reasonable expenses incurred, "including a reasonable attorney's fee." Ariz. R. Civ. P. 11(a); *see also* Ariz. R. Civ. P. 1 ("These rules govern the procedures in the superior courts of Arizona."). But Ginger has waived this argument because, albeit understandably, she failed to request sanctions below. *See Woodworth v. Woodworth*, 202 Ariz. 179, ¶ 29, 42 P.3d 610, 615 (App. 2002); *see also Bryant v. Block Cos.*, 166 Ariz. 46, 50, 800 P.2d 33, 37 (App. 1990) (attorney fees on appeal inappropriate where trial court had not yet found Rule 11 violation). More importantly, Rule 11 is not an appropriate legal basis for awarding attorney fees on appeal. *See Turf Paradise, Inc. v. Maricopa County*, 179 Ariz. 337, 342, 878 P.2d 1375, 1380 (App.

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[17]Ginger also contends "[t]he trial court failed to have a default judgment hearing pursuant to Rule 55(b)(2)," Ariz. R. Civ. P. *See Poleo*, 143 Ariz. at 134, 692 P.2d at 313. Jack joined in the arguments made in her brief. Because we reverse the sanctions against Ginger on other grounds, we need not address the issue.

1994) ("Attorney's fees are not recoverable without either a contractual or statutory basis for their award."). Therefore, we deny Ginger's request.

Disposition

¶48 For the reasons stated above, we vacate the court's sanctions order as it pertains to both Jack and Ginger and remand the case for further proceedings consistent with this decision.

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JOHN PELANDER, Chief Judge

CONCURRING:

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JOSEPH W. HOWARD, Presiding Judge

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J. WILLIAM BRAMMER, JR., Judge